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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 12, Original

UNITED STATES OF AMERICA,

Plaintiff,

vs.

STATE OF CALIFORNIA,

Defendant.

BRIEF OF THE NATIONAL ASSOCIATION OF ATTORNEYS GENERAL, *AMICUS CURIAE*

THE NATIONAL ASSOCIATION OF ATTORNEYS GENERAL.

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Dated: February 24, 1947.

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No. 12, Original

UNITED STATES OF AMERICA, Plaintiff,

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BRIEF OF THE NATIONAL ASSOCIATION OF ATTORNEYS GENERAL, *AMICUS CURIAE*

Statement

The National Association of Attorneys General is an organization composed of the Attorney General of each State. One of the cardinal purposes of said Association is that of enabling its members, through cooperative and concurrent effort, to carry out their sworn duty of defending and protecting the interests of the States they respectively serve.

Notwithstanding the fact that the expressed purpose of this litigation is limited to establishing "the rights of the United States in the bed of the Pacific Ocean adjacent to the coast of California beginning at low-water mark and extending seaward for three nautical miles",[1]

[1] See Motion for Leave to File Complaint and Complaint, p. 2.

we observe on page 4 of the Statement in Support of Motion to file the complaint the startling assertion that neither the original thirteen States nor those subsequently admitted into the Union on an equal footing with the original thirteen, ever owned the lands underlying the three-mile belt; and the Government's brief repeats this contention (p. 10).

The assertion that the several States never owned the lands underlying their coastal waters is of sufficient importance in itself and in its implications to challenge the grave concern of all of the States and the Attorneys General representing them.

This action attempts in effect to force the uncompensated transfer to Federal ownership by judicial decree of a considerable portion of the resources of a State.

Plaintiff evidently intends, even though the complaint describes only one State, to undertake to establish title to the submerged coastal lands of all of the States. For that reason this Association has requested permission to present its views on the issues involved.

The surprise, and even alarm, which have followed the Government's assertion that none of the States ever owned the submerged lands underlying their coastal waters,[2] has not been mitigated by the pronouncement found on page 2 of the Statement in Support of Motion, that this suit does not involve any bays, harbors, rivers or other inland waters; for, in attacking the title of the States to lands beneath coastal waters, the Plaintiff is at the same time attacking the authority of the cases in which this Court has recognized the title of the States to

[2] We shall use the term "submerged lands" in referring to land below low-water mark, and specifically those lands claimed by Plaintiff in its Complaint, and "coastal waters" in referring to waters sometimes described as within the maritime belt, the three-mile limit, or the marginal sea.

submerged lands underlying inland navigable waters. Indeed, the Government now asserts that this long line of cases is unsound! (Brief, pp. 11, 72).

To support its theory, Plaintiff begins by asking this Court to *sever* the principle governing coastal waters from the broad principle of law laid down by this Court in numerous decisions affirming title in the littoral States to lands underlying *all* navigable waters. Yet halfway through its brief Plaintiff admits that it is attacking the *whole* principle which has up to the present time recognized State ownership of navigable waters and the lands underlying them as an incident of State sovereignty. Acceptance of Plaintiff's views would impair even the legal basis which has hitherto supported the title of both coastal and inland States to the beds of navigable waters in bays, harbors and rivers.

To obviate the prolixity of pointing out those recognized differences among the several States in matters affecting the inception of sovereignty or relating to the proprietorship of lands within their boundaries, the National Association of Attorneys General will restrict itself, insofar as it is reasonably possible, to legal principles and facts of uniform application to all of the States, without prejudice to any State or States that may have additional grounds for establishing title.

Introduction to Argument

Since the present case is before the Court at this stage "on the pleadings" (Govt. Br., p. 6), we shall show first that the complaint sets forth no tenable basis for a claim of Federal ownership of submerged lands (Point I, *infra*).

We shall next show the early origins of the title of the States, and of the colonies before them, to the lands under navigable waters, including coastal waters, and the repeated assertion of that title in legislative acts, treatises and judicial opinions (Point II, *infra*). This will make

plain the error of the Government's contentions that the theory of ownership within coastal waters is a new concept (Govt. Br., p. 7) and that the Original Thirteen Colonies never claimed ownership in the submerged lands under coastal waters (Govt. Br., p. 10).

We shall next show that the Federal Government has acquiesced in the States' ownership in coastal waters for so long that the point is no longer open to dispute (Point III, *infra*). This is not simply a claim of estoppel, as the Government seems to treat it (Govt. Br., p. 12), but an instance of practical construction and long-continued recognition evidencing an established rule of property that should not be overturned.

Finally, we shall show that an attempt to lay down a new rule for submerged lands under coastal waters, different from that which the Government concedes has always been applied in bays, harbors and inland navigable waters, would open a Pandora's box of complexity and trouble (Point IV, *infra*).

ARGUMENT

POINT I

Plaintiff's complaint sets forth no tenable basis for any claim of title to submerged lands.

Plaintiff's claim that it has title to submerged lands under coastal waters of California and the other States, including the Original Thirteen States, is not based on any deed or cession from the States. It is not based on case law, for the cases all hold that title to submerged lands is in the States. It is not based on statute, for Congress has passed no statute purporting to give the Federal Government any title to submerged lands. Nor, as we shall show, is there any basis for the Federal Government's claim in the United States Constitution.

The lack of informing averments in the present complaint, relative to the origin and nature of Plaintiff's title, leads us to question whether it has any foundation at all for the claim it makes. To justify our position in making this statement, we make the following observations:

1. Plaintiff says in its Statement (p. 3) that its rights in submerged lands under coastal waters have never been adjudicated by this Court. This really is an admission that, even if all the cases asserting State title to submerged lands were explained away (which clearly cannot be done), there still is no decision which affirms Federal ownership of lands in coastal waters.

Were it true that this Court in the course of a century and a half had made no such adjudication, it would not help Plaintiff's case. It would only afford additional evidence that State ownership is the established rule and thus still further discredit Plaintiff's present claim. See Point III, *infra*. In other words, the Federal Government has been unconcerned or resigned to the property rule of State ownership for a period long enough to clothe its present assertion of title with a fair degree of skepticism.

2. Plaintiff's claim of title cannot be founded upon the assertion in its Statement in Support of Motion to file Complaint (p. 4), that it is the function of the Federal Government to establish and vindicate rights in the three-mile belt "against the possible claims of other nations." In its brief, the Government similarly urges that rights in the "three-mile belt" "may be vindicated as against other nations only by the national government" (p. 10).

This proves nothing unless the coastal seas are different in this respect from bays, harbors and inland waters, where concededly the States own the soil. It is clear that they are not different. The national government maintains forts within harbors for the defense of the States'

territory, and "vindicates" the rights of the States in boundary rivers. In fact, even matters of disputed boundaries on dry land are "vindicated" by treaties negotiated by the national government.[3]

The States delegated to the Federal Government the defense of all their territory, upland as well as submerged lands, although reserving rights with respect to their own militia. (See United States Constitution, Art. I, Sec. 9, cl. 16; Am. II.) Yet the fact that the Federal Government defends the uplands cannot be said to afford a basis for a Federal claim of title to territory within a State. By the same reasoning, the fact that it may be within the power of the Federal Government to vindicate the rights of the States within coastal waters against the possible claims of other nations is no basis for claiming title thereto in the Federal Government. In fact, the Constitution recognizes that the Federal Government must depend on cessions from the States to obtain land even for forts and other buildings needful to accomplish Federal purposes. (United States Constitution, Art I, § 8, cl. 17.) A cession of oceanfront land to the Federal Government for military purposes does not give the United States title to the adjoining lands under the sea, nor does its use of such waters impair the State's rights and jurisdiction in the territorial waters. *Hamburg American Steamship Co.* v. *Grube,* 196 U. S. 407 (1905).

3. Instead of alleging definitely fee simple title, Plaintiff avers alternatively in its complaint (Par. II) that it is either the owner of fee title to "or possessed of paramount rights in and powers over" the lands. The Federal government's paramount rights in certain specific fields are in no wise inconsistent with State ownership.

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[3] See, e. g., Griswold, *Hunting Boundaries with Car and Camera in the Northeastern United States* (1939) 29 Geographical Review 353, 372-82.

The United States Constitution, while giving the Congress certain powers of regulation of interstate and foreign commerce, confers no title on the United States to any lands under coastal waters or elsewhere.

Recognizing that the Constitution did not transfer to the United States any of the lands under navigable waters belonging to the original States, this Court held in *Mumford* v. *Wardwell,* 6 Wall. (73 U. S.) 423, 436 (1867):

> "Settled rule of law in this Court is, that the shores of navigable waters and the soil under the same in the original States were not granted by the Constitution to the United States, but were reserved to the several States".

This settled rule was again repeated in *County of St. Clair* v. *Lovingston,* 23 Wall. (90 U. S.) 46, 68 (1874).

"Paramount rights" and fee title are not equivalent claims. The power to regulate commerce and improve navigation, and the power to adjudicate cases in admiralty, are both "paramount", but the delegation of these powers is not and cannot be construed as a cession of the lands underlying navigable waters. This was specifically ruled in *United States* v. *Bevans,* 3 Wheat. (16 U. S.) 336, 388 (1818), wherein this Court held that the United States could not have exclusive jurisdiction in Boston Harbor unless Massachusetts had ceded the harbor, and that cession could not be deduced from the grant of admiralty and maritime jurisdiction in the Constitution. "This", said Chief Justice Marshall, "is a question on which the court is incapable of feeling a doubt. The article which describes the judicial power of the United States is not intended for the cession of territory or of general jurisdiction." The same ruling was made as to the defense power in the *Hamburg-American* case, (*supra,* p. 6).

In *Corfield* v. *Coryell,* 6 Fed. Cas. 551, No. 3230 C. C. Pa. 1823), Washington, Circuit Judge, held that the com-

merce power did not interfere with New Jersey's right to regulate oyster fishing in New Jersey waters, and gave the same reason (p. 551):

> "The grant to congress to regulate commerce on the navigable waters belonging to the several states • • • contains no cession, either express or implied, of territory or of public or private property."

Regulatory powers granted to the Federal Government are applicable throughout a State's territory, and have no relation to Federal ownership of land. Even when the United States exercises its control over navigation by building a dam in the bed of a navigable river, the bed of the river thus used by the Federal Government does not become Federal property unless the State cedes it. (*James* v. *Dravo Contracting Co.*, 302 U. S. 134, 140-1 (1937); *Atkinson* v. *State Tax Commission*, 303 U. S. 20, 22 (1938).) Moreover, the commerce power and the other powers cited by the Government (Br., p. 85) operate within harbors and on dry land, and are not peculiar to coastal waters or the soil under them.

Not only is the complaint inadequate to support a claim of Federal ownership, but we shall go on to show affirmatively that the Original Thirteen States and those admitted into the Union later "on an equal footing" have an irrefragable title to the land under all their navigable waters, inland or coastal. (Points II and III below.)

POINT II

The development of the law shows that the States have title to submerged lands within their boundaries, including lands under coastal waters.

At common law, before the Revolution, submerged lands under navigable waters, including coastal waters, belonged to the Crown, despite Plaintiff's attempts to explain

away the repeated declarations of the rule. By the Declaration of Independence, the original thirteen colonies acquired ownership of these lands from the Crown. All States subsequently admitted have come into the Union on an equal footing with the Original Thirteen, including ownership of submerged lands under their coastal waters and other navigable waters. The course of decisions in Federal and State Courts for a century and a half uniformly supports this rule.

A. The common law conception of dominion of submerged lands under coastal waters.

Plaintiff is forced to admit that authorities prior to the Revolution quite generally asserted title in the Crown to the lands under coastal waters (Govt. Br., pp. 7, 24-25, 116-17), and that most publicists in modern times recognize the littoral state's ownership of the subsoil of coastal waters (Govt. Br., pp. 31-32). In order to justify its argument that the Original Thirteen States did not succeed to the King's ownership of such submerged lands, Plaintiff is forced to argue that the present recognition of ownership is based on a different theory from the old claims, and that the present concept is "wholly independent" of the old claims (Govt. Br., p. 26)—although this "modern" doctrine stems back to 1702 (*ibid*).

This is a fallacious distinction. Rights within coastal waters today are the same rights asserted long before the Revolution, and are based on the same basic concepts of possessory control and appropriation of the products of the adjacent sea and of the land under it. The definition of the *width* of coastal waters as three miles (a temporary manifestation, not uniformly applied at any time) is merely a limit in space imposed upon the wider claims of earlier times. The adoption of this limit for certain purposes cannot operate to transfer to the Federal Government the ownership of the soil which had been first in the King and then in the Colonies and the States.

Textwriters

The fact that sovereignty over the sea is now more limited than was once claimed does not mean that ownership of coastal waters is something new. Judge Bustamante has pointed out that "There was territorial sea when high seas were not free. * * * It is very important that this historical truth be not lost sight of * * *". *The Territorial Sea* (1930) 6.

Until the Seventeenth Century, nations laid claim to great expanses of sea.[4] Later, the tendency was to limit the breadth of coastal water by the extent of actual possession effected by physical control through coast artillery.[5] This limitation later crystallized into a rule of thumb under which independent states were recognized as the owners of submerged lands extending three miles from their coast. Still later, the doctrine became severed from its original factual basis, and the three-mile limit was retained as a convenient measure for certain purposes even after the range of cannon increased.

All pre-revolutionary English textwriters uniformly asserted the King's ownership of the bed of the ocean surrounding the British Isles,[6] sometimes described as the "narrow seas".[7] In making these assertions of title, they

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[4] Hall, International Law 1880) Sec. 40, pp. 125-27, *id.* (8th ed 1924) pp. 189-92; Fulton, The Sovereignty of the Sea (1911) 25-517.

[5] Fulton, *supra*, pp. 537, *et seq.*

[6] Bracton, *De Legibus et Consuetudinibus Angliae* (1569), lib. 2, c. 2, fol. 9b (I Swiss ed. 71, 73); Selden, Dominion of the Sea (1652) g 2, Bk II, pp. 251, 274-75, 365-66, 384-85; Callis on Sewers (2d ed. 1685) pp. 39, 41-42, 44, 53; Bacon's Abr. (3d ed. 1768) Bk. 1, 623n.; Bk. 4, 153, 156, 157; 2 Blackstone's Comm. (3d ed. 1768) 261-2. See also Hall (R. G.), Rights of the Crown in the Sea-shores of the Realm (1830) in Apdx. to Answ., pp. 28-31.

[7] Hale, *De Jure Maris* (circ. 1676), c. IV, pp. 10-11, c. VI, p. 31, in Hargrave's Law Tracts (1787); 1 Roll. Abr. 528 (1668).

were fully consistent with the views then and later approved by writers on international law.

As early as 1598, Albertico Gentili, an eminent contemporary of Francis Bacon and the precursor of Grotius, clearly expressed the concept that a maritime nation owns its coastal waters.[8]

> "The Argives once expostulated with the Athenians, because the Athenians had allowed the Spartans, who were enemies of the Argives, to pass over their sea, although it was provided in the treaties, that neither should allow the enemy to pass through the places which were under their control. The remonstrance was justified, since the sea is a portion of the land, * * * as our jurists admit. *The adjacent part of a sea belongs to one's dominion, and the term 'territory' (territorium) is used both of land and water.*"[9]

A quarter of a century later Grotius, in expounding the freedom of the seas, yet conceded that "sovereignty over a part of the sea is acquired * * * in so far as those who sail over the part of the sea along the coast may be constrained from the land no less than if they should be upon the land itself * * *".[10]

The reasons for the allowance of ownership in the marginal sea were stated by Pufendorf in 1660 and 1672 as being based on fishing and the defense of the region.[11]

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[8] Gentili, *De Jure Belli* (1598) Bk. III, c. XVII 629. (Trans of 1612 ed. in Classics of International Law, 1933, p. 384.)

[9] Italics throughout the brief are ours, unless otherwise noted.

[10] Grotius, *De Jure Belli ac Pacis* (1625) Book II, c. III § XIII, p. 130 (Kelsey trans. of 1646 ed. in Classics of Int. Law, 1925, p. 214); id. § IX, pp. 128-29, trans. p. 210.

[11] *Elementarium Jurisprudence Universalis* (1660) Book I, p. 31 (Trans. of 1672 ed. in Classics of Int. Law, 1931, p. 28); *De Jure Naturae et Gentium* (1672) Book IV, c. V, pp. 383-84, 385 (Trans. of 1688 ed. in Classics of Int. Law, pp. 562, 565).

Ownership was more than once attributed to the possibility of exclusive appropriation by the littoral state,[12] and justified because of the possibility that the resources of the ocean-bed might otherwise be exhausted.[13] We shall show hereinafter (pp. 17, 44, *et seq.*) that the colonies before the Revolution and the States immediately afterward repeatedly exerted their ownership in coastal waters for the preservation of fisheries, pursuant to the same principle set forth by Pufendorf.[14]

In 1703 Cornelius Van Bynkershoek suggested that the extent of effective appropriation in his day was the extent of cannon range. That, he said, "is as far as we seem to have both command and possession. I am speaking, however, [he warned] *of our own times*, in which we

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[12] Vattel, Law of Nations (1758) Book I, c. XXIII, § 289 (Fenwick trans. in Classics of Int. Law, 1916) pp. 108-09; Selden, Dominion of the Sea (2d ed. 1652) Bk. II, pp. 288, 298, 357, 363-70, 373-75, 441-42; Hale, *De Jure Maris, supra*, note 7, p. 10; Von Martens, Law of Nations (1789) c. IV, § 10, *id.* (1st Am. ed. 1795) p. 165. Hall (W.E.), International Law (8th ed. 1924) 189 states the same proposition in modern terms. He treats the disappearance of "extravagant pretensions" as based on recognition that possession of vast seas was found to be unreal, but asserts that the marginal sea is capable of appropriation and "is always appropriated" (p. 190).

[13] See, e. g., Vattel, Law of Nations (London, 1758; Fenwick trans. in Classics of International Law, 1916) Book I, c. XXIII, § 287.

> "The various uses to which the sea near the coasts can be put render it a natural object of ownership. Fish, shells, pearls, amber, etc. may be obtained from it. Now with respect to all those things, the resources of coast seas are not inexhaustible, so that the Nation to which the shore belongs may claim for itself an advantage thus within its reach and may make use of it, just as it has taken possession of the lands which its people inhabit." (p. 107 of Fenwick transl.)

See also Selden, Dominion of the Sea (2d ed. 1652) Book I, c. XXII, p. 141; Pufendorf, *De Jure Naturae et Gentium, supra*, note 11, pp. 383-84.

[14] The works of Grotius, Pufendorf and Vattel were among the staple readings of American lawyers at the time of the Revolution. (Reeves, The Influence of the Law of Nature (1909) 3 Am. J. of Int. Law 547, 549-52.)

Chief Justice Marshall and Justice Story referred to Bynkershoek, Grotius, Pufendorf and Vattel as familiar authorities in early cases, e.g., *The Nereide*, 9 Cranch 388 (1815).

use those engines of war; otherwise I should have to say in general terms that the control of the land ends where the power of men's weapons ends; for it is this, as we have said that guarantees possession".[15]

By the time of the Revolution, the range of guns actually in place on the shore was approximately one marine league and the distance within which the State could then assert control over its coastal waters formed the original basis for the present minimum three mile dominion of coastal water.[16] It furnished, indeed, the legal foundation for Lord Stowell's decision in *The Anna* where, after paraphrasing Bynkershoek's formula, he said that since the introduction of firearms, the boundary of territorial waters "has usually been recognized to be about three miles from the shore".[17] This assimilation of the cannon shot range to the three mile distance of coastal waters persisted—for the nations that adopted it—long after the science of ordnance had considerably extended the range of artillery.

Ownership of the bed of coastal waters is confirmed by the treatises most nearly contemporary with the Revolution. Von Martens in 1795 declared:[18]

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[15] *De Dominio Maris* (1703) 364 (trans. of 1744 ed. in Classics of Int. Law, 1923, p. 44); see also his *Quaestionum Juris Publici* (1737) lib. 1, c. VIII, p. 59: "*imperium terrae finiri, ubi finitur armorum potestas.*"

The history of the doctrine of cannon range, and the ownership of subsoil by the littoral state is also discussed in Raestad, *La Mer Territoriale* (1913) c. I-VIII passim; Fraser, The Extent and Delimitation of Territorial Waters (1926) 11 Corn. L. Q. 455, 457-58.

[16] Von Meyer, The Extent of Jurisdiction in Territorial Waters (1937), shows the variety of widths adopted by various nations at various times for various purposes.

[17] (1805) 5 C. Rob. 373, 385, 165 Eng. Rep. 809.

[18] Von Martens, Law of Nations (Cobbett transl., Philadelphia 1795) 165-66. See also Angell, Right of Property in Tide Waters, and in the Soil and Shores Thereof (Boston, 1826) 18-20, 37-38; 1 Kent's Commentaries (New York, 1826) 29; Hall (R.G.), Rights of the Crown in the Sea-Shores of the Realm (1830) 1-7, Apdx. to Answ., pp. 28-31; Wheaton, Elements of International Law (1836) 142-3.

"The sea surrounding the coast, as well as those parts of it which are land-locked, such as the roads, little bays, gulphs, etc., as those which are situated within cannon shot of the shore (that is, within the distance of three leagues), are so entirely the property, and subject to the dominion, of the master of the coast, that he has the exclusive right to all the produce of it, whether ordinary or accidental, as far as relates to things unclaimed by any other lawful proprietor. * * * In short, *these parts of the sea surrounding the coast, ought to be looked upon as forming a part of the territory of the sovereign who is master of the shore.*"

Colonial charters and statutes

Examination of colonial charters and statutes show an awareness of the rights in coastal waters, quite contrary to the assertion of the Government that "in none of them is there any reference to the marginal sea" (Br. p. 141).

The Plymouth Colony charter of 1620 granted:

"all the Main Lands from Sea to Sea together also with all the firme Lands *Soiles* Grounds Havens Ports Rivers *Waters Fishings* * * * and all and singular other Comodities Jurisdicions *Royalties* Privileges Franchises and Preheminences both within the said Tract of Land upon the Main and alsoe *within the Islands and Seas Adjoining* * * *" (I Acts and Resolves of Province of Massachusetts Bay 1; Apdx. to Answ., pp. 40-41).[19]

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[19] California's original three-volume answer is referred to in this brief as Apdx. to Answ.

With respect to this charter, which shows the pattern of most of the other colonial charters,[20] Gould on Waters (3d ed. 1900) states that (pp. 70-71):

> "the other words employed, and especially the word 'royalties', in connection with the manifest purpose of the grant, were held to convey to the colonial governments the right and jurisdiction of the Crown in the shores of navigable waters, and in the soil under such waters".

The Rhode Island charter granted by Charles II in 1663 follows the same principle, in that it reserves to British subjects "full and free power and liberty to continue and

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[20] This common pattern is followed in the Virginia charters of 1609 and 1611-12 (2 Poore, Federal and State Constitutions (1878) 1897, 1903; Apdx. to Answ., p. 39); New Hampshire grant of 1629 and New Hampshire charter of 1635 (2 Poore, pp. 1271, 1273; Apdx. to Answ., pp. 46-7); Maryland charter of 1632 (1 Poore, p. 812; Apdx. to Answ., p. 50); Connecticut charter of 1662 (1 Poore, p. 257; Apdx. to Answ., p. 48); Rhode Island charter of 1663 (2 Poore, p. 1602); Carolina charters of 1663 and 1665 (2 Poore, pp. 1383, 1390-1; Apdx. to Answ., pp. 51-2); 1664 grant to James, Duke of York (1 Poore, pp. 783-4; Apdx. to Answ., pp. 49-50); 1674 grant to James, Duke of York (1 Poore, p. 786; mentioned, Apdx. to Answ., p. 50); Massachusetts Bay charter of 1691 (1 Poore, p. 947; Apdx. to Answ., p. 43); Georgia charter of 1732 (1 Poore, p. 373; Apdx. to Answ., pp. 53-4). A variant, with even greater emphasis on ownership in sea areas, is the Maine grant of 1639 (1 Poore, p. 775, partly in Apdx. to Answ., pp. 43-4):

> "Alsoe the north half of the Isles of Shoales together with the Isles of Capawock and Nawtican neere Cap Cod as also all the islands and iletts lyeing within five leagues of the Mayne all along the aforesaid Coasts * * * with all and singular the *Soyle* and *Grounds thereof as well drye as covered with water* and all waters Portes Havens and Creeks of the Sea and Inletts of the said Province of Maine * * * together with the Fising of whatsoever kinde as well Pearle as Fishe as Whales Sturgeons or any other either in the Sea or Rivers * * * And all Gould Silver Pearle Precious Stones and Ambergreece which shall be founde within the said Province and Premises * * * and Coasts of the same or any of them."

use the Trade of Fishing upon the said Coast *in any of the Seas thereunto adjoining* * * *", and provides "that if any of the inhabitants of said Colony * * * be industrious in the Discovery of Fishing Banks in and about the said Colony, we will from time to time give and allow all due and fitting Encouragement therein, as to others in cases of like Nature * * *" (Acts and Laws of Rhode Island (1730) p. 9). The Connecticut charter of 1662 and the Massachusetts Bay charters of 1629 and 1691 contained the same reservation (1 Poore, Federal and State Constitutions [1878] 256, 941-42, 947).

With respect to such reservations of the right of fishery, Angell said in his treatise on Tide Waters (1826):

> "* * * By a reservation of this kind, it is clear that the king considered himself as the undoubted and legal proprietor of the tide waters; for if he had not thus considered, then to qualify his grants by such a reservation was manifestly absurd" (p. 38).

Other colonial charters, set forth in the appendix to California's answer, likewise contain specific mention of the adjoining seas, or of lands, soils, waters, fishings, royalties, and other provisions designed to convey the king's title in the beds of coastal waters.[21]

The charters granting all islands within a specified distance of land are also relevant, for the common law based the ownership of islands upon the ownership of the ocean

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[21] 1584 charter to Sir Walter Raleigh (Apdx. to Answ., pp. 36-37); 1629 Massachusetts charter (Apdx. to Answ., pp. 41-42); 1632 charter of Maryland (Apdx. to Answ., pp. 50-51); 1662 charter of Connecticut (Apdx. to Answ., p. 48); 1663 and 1665 Carolina charters (Apdx. to Answ., pp. 51-52); 1732 charter of Georgia (Apdx. to Answ., pp. 53-54). The 1691 Massachusetts Bay charter fixes limits that take in coastal waters (1 Poore, p. 947).

bed.[22] The 1691 charter of Massachusetts Bay Colony granted all islands within "tenn Leagues directly opposite to the Main Land" (Apdx. to Answ., p. 43). Similarly, the Virginia charter of 1609 grants all islands "within one hundred miles along the Coast" (Apdx. to Answ., p. 39), the New Hampshire charter of 1635 all islands within "five leagues distance" (Apdx. to Answ., p. 47), and the Georgia charter all islands "within twenty leagues" (Apdx. to Answ., p. 54), to cite but a few examples. The inclusion of these islands necessarily included sea areas.[23]

An early statute expressing the same principle of ownership within coastal waters is the enactment of the Plymouth General Court in June 1652 that:

> "* * * if any man take a drift whale of att the sea and bring or tow it to the shore, it [shall] be accounted his owne goods; but *if within a harbour or mile of the*

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[22] See Blackstone's Commentaries (3d ed. 1768) Bk. II, 261-62:

> "in case a new island rise in the sea, though the civil law gives it to the first occupant, yet ours gives it to the king. And as to lands gained from the Sea, either by alluvion * * * or by dereliction * * * if the alluvion or dereliction be sudden or considerable, in this case it belongs to the king; for, as the king is lord of the sea, and so owner of the soil while it is covered with water, it is but reasonable that he should have the soil, when the water has left it dry.".

See also Hall, Rights of the Crown in the Sea-Shores of the Realm (Apdx. to Answ., pp. 28-31); *Secretary of State for India* v. *Chelikani Rama Rao*, L. R. 43 Ind. App. 192, 32 T. L. R. 652 (P. C. 1916).

[23] See the modern calculations of a State's three mile limits where islands are involved. *Bosarge* v. *State*, 23 Ala. App. 18, 121 So. 427 (1928), cert. den., 219 Ala. 154, 121 So. 428 (1929), cert. den., 280 U. S. 568 (1929); *Ex parte Marincovich*, 48 Cal. App. 474, 192 Pac. 156 (1920); *State* v. *Ruvido*, 137 Me. 102 (1940).

shore they be taken they be reputed the townships where they are brought on shore."[24]

An act of the General Court of Plymouth Colony, in July, 1684, took note of the damage done from catching mackerel with seines "att Cape Codd or else where *near any shore* in this Colonie", and enacted that no person should "catch or draw on shore any mackerell, with nett or netts, sayne or saynes in any parte of this Colonie." (Plymouth Colony Laws (1836) Part II, p. 205). Many other colonial fishing regulations[25] testify to the importance which that industry had in early times, and thus to the reality of the colonies' concern with jurisdiction of coastal waters.

These fishing regulations take on added importance in the light of this Court's statement that control over fisheries is part of the "territorial jurisdiction" of a State (*Manchester* v. *Massachusetts*, 139 U. S. 240, 258), and that it is founded upon ownership of the underlying land (*McCready* v. *Virginia*, 94 U. S. 391, 394).

There are examples of other exercises of jurisdiction in coastal waters during colonial times. A grant made under a 1707 Rhode Island statute, referred to in *Armour & Co.* v. *City of Newport*, 43 R. I. 211, 110 Atl. 646

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[24] Plymouth Colony Laws, Part I, 96-97. See also id., Part III, 282 (Revised Laws, 1671, c. XI, § 2):

> "* * * all such Whales as are cast up within the Bounds of any particular Township, or floating upon the stream, within a Mile of the Shoar, against the said Bounds of any Township, shall be accounted the respective Towns falling within their Bounds as aforesaid * * *."

[25] Plymouth Colony Laws (1836), Part III, pp. 282, 283-4, Revised Laws 1671, ch. XI, §§ 3, 4; I N. H. Laws, (1679-1702) 207, Law of June 1, 1687; Mass. Province Laws 1692-3, c. 32, Act of Nov. 26, 1692, §§ 1, 2; Mass. Province Laws 1702, c. 12, Act of Nov. 21, 1702; 1 Nevill 86, N. J. Acts 1718, c. XXX; I N. Y. Colonial Laws, p. 845, Act of May 19, 1715; II N. Y. Colonial Laws, p. 1067, Act of Dec. 16, 1737; see *Arnold* v. *Mundy*, 1 Halst. (6 N. J. L.) 1, 91-92 (1821).

(1920), conferred the right to build a wharf for eight hundred feet beyond low water mark.

To combat erosion on an exposed beach at Rye, New Hampshire, the General Assembly of that colony in 1763 passed "An Act to Enable the owners of a Piece of Marsh or thatch ground lying in the Parrish of Rye Called Sandy Beach, to Finish a Wharfe to Prevent the Tide from carrying away said Beach" (III N. H. Laws (1745-74) 336). The Muscongus grant of March 13, 1629, made by the New England Council under the 1620 Plymouth charter covered lands on the coast of Maine, "together with all Sd land yt ly & be within ye Space of Three miles within ye Space of Sd land & Prmisses or any of them". This grant included islands within the three-mile space from the mainland. See *Lazell* v. *Boardman*, 103 Me. 292, 294, 69 Atl. 97, 98 (1907); Farrow, *History of Islesborough, Maine* (1893) 1-2.

A square ruling that the province of New York included coastal waters outside the harbor was made by the colonial Supreme Court in the case of *Kennedy* v. *The Sloop Mary & Margaret Thomas, Fowles Reclaimant* in 1739.[26] The sloop had transferred foreign gunpowder and molasses to a pilot boat at a point between Sandy Hook and the Narrows. The goods having been seized on the pilot boat and a libel filed against the sloop in the Court of Admiralty, the owner of the sloop applied for a writ of prohibition on the ground that the offence was committed within a county and the Admiralty Court therefore had no jurisdiction. His argument that "the whole Colony of New York is divided into twelve counties and that there is no part of said Colony but is contained in the said Counties or one of them", was sustained by the Supreme Court, as against the Advocate General's argu-

[26] See 6 O'Callaghan, Documents Relative to the Colonial History of New York (1855) 154-55. It is also of interest that the southwestern corner of the province of New York was in the waters of Lake Erie, 8 *id.* 434, 438.

ment that the counties nearest to the place where the illegal transfer took place were "bounded by the waters". In other words, the court held that the county boundaries included waters outside the harbor.

Some of the boundaries fixed by the colonies specifically included water[27] and nearby islands.[28]

It will thus be seen that sovereign ownership in the coastal seas has always been part and parcel of the law of sea rights. The freedom of the seas has not affected this right, but only curtailed any extravagant extensions of it. When we turn from International Law to the law of England and the English colonies up to the time of the Revolution, we find the proprietary right of the Crown in the coastal waters and the bed of the sea was likewise firmly established.

B. The States acquired the title of the Crown to submerged lands.

Under English rule the thirteen colonies were free and independent of each other. In separating from England they maintained their character as separate independent states, and each acquired the King's former title to all land within its boundaries, including submerged lands under coastal waters.

By the Declaration of Independence, in July 1776, the several colonies, united for purposes of common defense, asserted their new character as "Free and Independent States." As such states, they succeeded to all rights which the British Crown had ever possessed. Their ownership of land was confirmed by the treaty which ended the Revolution, and was never surrendered to the Federal

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[27] I Acts and Resolves of the Province of Massachusetts Bay 642 (Province Laws 1709-10, c. 4).

[28] III New Hampshire Laws (1745-74) 524, 525-26 (Act of April 29, 1769); Georgia Dig. of Laws to 1800, p. 114 (Act of March 25, 1765).

Government. When the thirteen States formed the Union they had already existed as sovereign States, and in forming the Union they brought with them the sovereignty that they had enjoyed, reserving all of the same except that which was surrendered to the Federal Government.

The Articles of Confederation, which were adopted only one year later, provided in Article II thereof:

> "Each State retains its sovereignty, freedom and independence, and every power, jurisdiction and right, which is not by this confederation expressly delegated to the United States, in Congress assembled."

These Articles, establishing the conditions on which the independent colonies joined their efforts for mutual defense, thus expressly restated the reservation by the individual States of their respective "sovereignty, freedom and independence."[29]

The Treaty of Peace with Great Britain in 1783, generally referred to as the Treaty of Paris, followed by several years the Declaration of Independence, and in it we find this language:

> "His Britannic Majesty acknowledges the said United States, viz., New Hampshire, Massachusetts Bay, Rhode Island and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, and Georgia to be free, sovereign, and independent states; that he treats with them as such, and for himself, his heirs, and successors, relinquishes all claims to the Government, propriety and territorial rights of the same, and every part thereof."

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[29] Provisions which would have authorized the Congress to limit or ascertain the bounds of any Colony were expressly rejected (5 Journals of the Continental Congress 681-82; 9 *id.* 806-09; Burnett, The Continental Congress (1941) 250, 341), thus emphasizing the States' retention of their territory in the absence of voluntary cession.

This Treaty reiterated the separate sovereignty of the individual States and a definite intention to deal with these "free, sovereign and independent states * * * as such."

The boundary in the Treaty, embracing all islands within twenty leagues of the shore (Govt. Br., p. 110), certainly relinquished all the King's rights in coastal waters.

Since we have seen that sovereign ownership of coastal waters had been definitely established before the Revolution, the King's relinquishment to the "free, sovereign and independent States" of "all claims to the government, propriety and territorial rights of the same" clearly gave the Original Thirteen States full rights in their coastal waters and the lands beneath them. Those rights had already been fully established both in international law and by English law.

With even greater care and caution than that exercised in drafting the Articles of Confederation, the original thirteen States spoke their will and determination, relative to the reservation of sovereignty, when the Constitution of the United States was adopted. Pursuant to requests by the conventions of the States which ratified the Constitution, ten amendments were offered at the session of the First Congress in 1789, expressly designed to show the reservation of state rights and sovereignty, except such as were specifically granted by them to the United States in the Constitution. Amendment X is illustrative:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

The preamble to the first ten amendments indicates that these amendments expressed views pronounced by a number of the States at the time they adopted the original

Constitution, in order to prevent misconstruction of the Federal Government's powers.

We recognize that the States entrusted certain external powers to the central government even under the Articles of Confederation,[31] and that broad powers with reference to foreign affairs were granted in the Constitution. Nevertheless the fact remains that such grants of power were not cessions of territory and the Federal Government acquired no title to land within any State's boundaries by either of these documents or under any other grants from the individual States, except the cessions of the Northwest Territory to the Congress of the Confederation and except grants made specifically under Article I, Section 8 of the Constitution.

For title sources thus we see that the several States (1) asserted complete sovereignty in the Declaration of Independence; (2) expressly reserved that sovereignty in the Articles of Confederation; (3) received a veritable quitclaim of all of Great Britain's territorial rights by the treaty of peace; and (4) again reserved their sovereignty and ownership in the Constitution.

There was no interval after the Revolution during which coastal waters were without an owner and claims thereto lay dormant, to emerge later in a new and independent form, as the Government's theory assumes.

Jefferson's note in 1793, announcing that the United States would exercise its territorial protection for three geographical miles from the seashore, and interpreting that as the utmost range of a cannon ball, was in no way

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[31] This is all that the Court said in *United States* v. *Curtiss-Wright Export Corp.*, 299 U. S. 304 (1936), which the Government cites repeatedly (Br., pp. 75, 76, 78, 90, 157). Ownership of submerged lands under coastal waters does not depend upon external sovereignty. It is a rule of property law, as recognized in the long series of decisions in this Court cited hereinafter (pp. 27-35, *infra*).

inconsistent with the States' territorial ownership, as the Government vainly contends (Br., pp. 130-34). He based his conclusion upon the previous authorities, which we have seen recognized ownership in coastal waters; his note merely fixed for the time being the limits of the claims which this country would protect, just as it protects islands, shore and upland. It had become a rule of law by this time, regardless of the historic appendant reason,[30] that a State had territorial dominion over submerged lands lying seaward from the shore to a distance of at least three miles, just as the British Crown had held title to the beds of all navigable waters within the jurisdiction of the Crown.

This Court from an early time has recognized and affirmed that the States and not the Federal Government acquired as a result of the Revolution whatever title the Crown had ever possessed. As was said in *Harcourt* v. *Gaillard*, 12 Wheat. 523, 526 in 1827:

> "There was no territory within the United States that was claimed in any other right than that of some one of the confederated States."

In *Martin* v. *Waddell*, 16 Pet. (41 U. S.) 367, 410 (1842), in dealing with oyster fisheries under the navigable waters of Raritan Bay, and below low water mark,[32] the Court stated:

> "when the Revolution took place, the people of each State became themselves sovereign; and in that

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[30] The range of cannon no longer determined dominion. *Cleavage had occurred between the rule and the reason.*

[32] It is apparent that the land involved in the *Martin* case was below the low-water mark, not alone by the use of the words "navigable waters," but also by the fact that oysters are grown only under salt water and not on the foreshore where they would be subject to exposure at low-tide. See Nelson's Perpetual Loose-Leaf Encyclopedia under heading "Oyster."

> character held the absolute right to all their navigable waters and the soil under them for their own common use, subject only to the rights since surrendered by the Constitution to the general government. * * *"

In referring to the soil under navigable waters, this Court clearly included lands below low water mark.

The Court further held:

> "when the people of New Jersey took possession of the reins of government, and took into their own hands the powers of sovereignty, the prerogatives and regalities which before belonged either to the crown or the Parliament, became immediately and rightfully vested in the State" (16 Pet. at 416).

To the same effect Mr. Justice Field stated in *Weber* v. *Board of State Harbor Commissioners,* 18 Wall. (85 U. S.) 57, 65 (1873) that by the common law:

> "the title to the shore of the sea, and of the arms of the sea, and in the soils under tide waters, is, in England, in the King, and in this country, in the state."

Thereafter, in *Shively* v. *Bowlby,* 152 U. S. 1, 14 (1894), the Court sustained a State grant of tidelands[33] as against

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[33] Tide lands are not restricted to lands above low-water mark, as the Federal Government asserts (Br. p. 19). That definition was *not* endorsed by this Court in *Walker* v. *State Harbor Commissioners* (17 Wall. at 651), nor does the other case that the Government cites (Gov. Br., p. 19), *Baer* v. *Moran Bros. Co.,* 153 U. S. 287, indicate that the term cannot properly include submerged lands. In the constitutions and statutes of California and Washington, the States where the *Walker* and *Baer* cases arose, "tide lands" has been used at least five times with the obvious intention of including submerged lands. *San Pedro R. R. Co.* v. *Hamilton,* 161 Cal. 610, 616, 119 Pac. 1073, 1074 (1911); *State ex rel. McKenzie* v. *Forrest,* 11 Wash. 227, 230-34, 37 Pac. 684, 685-86 (1895).

"Tide waters," of course, include all coastal waters. See, e. g., *Manchester* v. *Massachusetts,* 139 U. S. 240, 258 (1891).

one claiming under a Federal grant, and stated:

> "upon the American Revolution, all the rights of the Crown and of Parliament vested in the several States, subject to the rights surrendered to the national government by the Constitution of the United States."

This Court in that same case recognized the scope of the colonial charters we have described above, stating (152 U. S. at 14):

> "The various charters granted by different monarchs of the Stuart dynasty for large tracts of territory on the Atlantic coast conveyed to the grantees both the territory described and the powers of government, including the property and the dominion of lands under tide water."

Numerous state cases pronounced the same doctrine of State succession to the rights of the Crown in land under navigable waters.[34]

The States continued to exercise various rights of ownership in the coastal waters, just as the Colonies had before the Revolution. Some examples of State action will be cited below in Point III.

C. The doctrine of State ownership of lands under all navigable waters, including coastal waters, is definitely established by repeated pronouncements of this Court.

It would be difficult to find any rule of law more clearly and uniformly settled than the rule which recognizes the

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[34] *Barker* v. *Bates*, 13 Pick. 255 (Mass. 1832); *Dunham* v. *Lamphere*, 3 Gray 268 (Mass. 1855); *Nichols* v. *Boston*, 98 Mass. 39, 42 (1867); *Gough* v. *Bell*, 21 N. J. L. 156, 160 (1847); *People* v. *Trinity Church*, 22 N. Y. 44 (1860); *Coxe* v. *State*, 144 N. Y. 396, 406 (1895); *Armour & Co.* v. *City of Newport*, 43 R. I. 211, 213, 110 Atl. 646 (1920); *Commonwealth* v. *Newport News*, 158 Va. 521, 541. 164 S. E. 689 (1932).

title of the individual States to all lands under navigable waters within their boundaries. This is derived from and consistent with the English common law rule, that the King's ownership of the beds of coastal waters extended inland as far as high-water mark. We have been unable to find a case which even expresses a doubt concerning the ownership of such submerged lands, whether within rivers, bays and harbors, or within coastal waters.

An example of a square holding on the States' ownership of land beneath coastal waters is *The Abby Dodge*, 223 U. S. 166 (1912).

In *The Abby Dodge*, this Court held that the Federal government cannot regulate sponge fishing in the Gulf of Mexico within the territorial waters of a State[35] and that an indictment for violation of a federal law prohibiting the use of diving apparatus in sponge fishing must negative the possibility that the offense occurred in State waters. It based this ruling (p. 174) on the principle that "each State owns the beds of all tide-waters within its jurisdiction" and quoted its formulation of that principle from *McCready* v. *Virginia*, 94 U. S. 391 (1876), discussed below.

The Government attempts to distinguish the *Abby Dodge* case on the ground that no contention was made that the United States owned the sponges within the three-mile belt (Br., p. 161).[36] The argument for the United States in that case, however, unsuccessfully advanced (223 U. S. at 170-71) the same contention respect-

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[35] The argument before this Court showed that the territorial waters of Florida, there in question, extended three leagues from shore, in the Gulf of Mexico (223 U. S. at 169).

[36] The Government contended there, in order to show that the sponges were taken outside territorial limits of the State, that the sponge beds in question were "from fifteen to sixty and sixty-five miles out" (223 U. S. at 177).

ing the international nature of the three-mile belt upon which the Government here relies. Since sponges grow attached to the bed of the ocean far beyond low-water mark, it is inconceivable that this Court would have held the Federal statute inapplicable to the taking of sponges, if the bed of the ocean belonged to the United States.

That the States retained their ownership within the three-mile limit is established also by this Court's decision in *Manchester* v. *Massachusetts*, 139 U. S. 240 (1891). A Massachusetts statute of December 28, 1859, had proclaimed that "The territorial limits of the Commonwealth extend one marine league from its seashore at low-water mark." Manchester was convicted in the State Court of illegal fishing within the State's territorial waters, but declared that the locus was on the high seas and therefore within the exclusive jurisdiction of the Federal Courts. The Supreme Court upheld the State Court. The Supreme Court said that:

> "*if Massachusetts had continued to be an independent nation, her boundaries on the sea, as defined by her statutes, would unquestionably be acknowledged by all foreign nations,* and her right to control the fisheries within those boundaries would be conceded. The limits of the right of a nation to control the fisheries on its seacoasts, and in the bays and arms of the sea within its territory, *have never been placed at less than a marine league from the coast on the open sea;* • • •" (139 U. S. at 257).
>
> "*The extent of the territorial jurisdiction of Massachusetts over the sea adjacent to its coast is that of an independent nation;* and, except so far as any right of control over this territory has been granted to the United States, this control remains with the State • • • *Within what are generally recognized as the territorial limits of States by the law of nations, a State can define its boundaries on the sea* • • •" (p. 264).

The Government now suggests that because the offense occurred in Buzzard's Bay, the *Manchester* opinion has no bearing on rights within the three-mile belt (Br., pp. 156-157). The important point dealt with by the Court in that case was not that the offense occurred in a bay, but that the illegal fishing for which Manchester was convicted occurred within the three-mile limit. The State's ownership of the bay was based upon its ownership of the lands within three miles of its shore. The Court said (139 U. S. at 258):

> "We think it must be regarded as established that, as between nations, the minimum limit of the territorial jurisdiction of a nation over tidewaters is a marine league from its coast; that bays wholly within its territory not exceeding two marine leagues in width at the mouth are *within this limit* * * *."

In other words, the holding of State title within a bay of "two marine leagues in width at the mouth" is merely a means of applying the general principle of State ownership of submerged lands within a marine league of the coast. Its application to Buzzard's Bay therefore constitutes acceptance of the general principle, and does not represent any special rule designed only for bays and harbors.

The numerous statements by this Court of State ownership of coastal waters, which we shall now discuss, take added significance from the nature of the holdings in the two cases we have just analyzed.

The *McCready* case was not the first to announce the doctrine of state ownership of submerged lands. It was set forth in *Martin* v. *Waddell*, 16 Pet. (41 U. S.) 367 (1842), from which we have already quoted (*supra*, pp. 24-25).

Exactly the same language was used in the case of *Mumford* v. *Wardwell*, 6 Wall. (73 U. S.) 423 (1867),

as had previously been used in the case of *Martin* v. *Waddell.*

Continuing chronologically, in *Den* v. *The Jersey Co.,* 15 How. (56 U. S.) 426 (1853), the Court had under consideration land which was formerly under the tide waters of the Hudson River below low water mark. In that case the Court held that the decision in *Martin* v. *Waddell* governed and that:

> "the soil *under the public navigable waters* of East New Jersey belonged to the State" (15 How., at 432).

In *Smith* v. *State of Maryland,* 18 How. (59 U. S.) 71, 74 (1855), this Court held:

> "Whatever soil *below low water mark* is the subject of exclusive propriety and ownership, belongs to the state *on whose maritime border,* and within whose territory, *it lies,* subject to any lawful grants of that soil by the state, or the sovereign power which governed its territory before the Declaration of Independence."

Plaintiff's present contention, that part of the land below low-water mark belongs to the Federal Government, is directly contrary to the statement above that "whatever soil below low-water mark is the subject of exclusive propriety and ownership belongs to the State."

Again in *Weber* v. *Board of State Harbor Commissioners,* 18 Wall. (85 U. S.) 57, 65 (1873), this Court held:

> "By that law the title to the *shore of the sea,* and of the arms of the sea, and in the *soils under tide waters,* is, in England, in the King, and in this country, *in the state.*"

Here the Court refers to (1) shore of the sea, (2) arms of the sea and (3) soils under tidewaters. It is quite

evident that these phrases do not all mean the same thing. Thus the decision is not limited solely to the strip of land between high and low water; on the contrary the Court is stating a rule which applies to *all* lands beneath the waters of the sea or any part thereof within a state's boundaries.

The decisions on the subject are so numerous and so uniform in affirmance of the doctrine that Chief Justice White observed in 1876 in *McCready* v. *Virginia*, 94 U. S. 391, 394, that:

> "The principle has *long been settled* in this court, that each State owns the beds of all tide-waters within its jurisdiction, unless they have been granted away."

In *Shively* v. *Bowlby*, 152 U. S. 1, 11 (1894), it is stated:

> "By the common law, both the title and the dominion of *the sea*, and of rivers *and arms of the sea*, where the tide ebbs and flows, and of *all the lands below high-water mark*, within the jurisdiction of the Crown of England, are in the King. * * *"

In its considered pronouncement of this doctrine it is quite evident that the Court has applied the same legal rule to those lands "where the tide ebbs and flows" and also to "all lands below the high-water mark", which necesarily includes the submerged lands lying below low-water mark and underlying the coastal waters. The Court went on to hold that the soils under navigable waters, including tide waters, "were not granted by the Constitution to the United States, but were reserved to the States respectively" (p. 36).

In *Illinois Central R. Co.* v. *Illinois*, 146 U. S. 387, 435 (1892), this Court likewise stated, with respect to lands under the waters of Lake Michigan:

> "It is the settled law of this country that the ownership of and dominion and sovereignty over lands covered by tide waters, within the limits of the several States, belong to the respective States within which they are found. * * *"

The fact that the *Illinois Central* case related to one of the Great Lakes is by no means a distinguishing feature, in spite of plaintiff's attempt to classify the Great Lakes as inland waters (see Govt. Br., pp. 257 (Ohio grant) and 258 (Wisconsin grant)). The ownership of the bed by the State of Illinois was not based upon any doctrine peculiar to the Great Lakes, but was pronounced as an application of the doctrine of State ownership of lands under navigable waters. This Court said (146 U. S. at 435):

> "The same doctrine is in this country held to be applicable to lands covered by fresh water in the Great Lakes over which is conducted an extended commerce with different States and foreign nations. These lakes possess all the general characteristics of open seas, except in the freshness of their waters, and in the absence of the ebb and flow of the tide. In other respects they are inland seas, and there is no reason or principle for the assertion of dominion and sovereignty over and ownership by the State of lands covered by tide waters that is not equally applicable to its ownership of the dominion and sovereignty over lands covered by the fresh waters of these lakes."

The pertinence of cases and statutes relating to the Great Lakes is further emphasized by this Court's ruling that the Detroit River, connecting Lake Huron with Lake Michigan, is part of the "high seas." *United States* v. *Rodgers*, 150 U. S. 249, 256 (1893); *cf. The Genesee Chief*, 12 How. 443 (1851).

In *United States* v. *Mission Rock Company*, 189 U. S. 391, 404 (1903), this Court held, quoting from *Weber* v. *Commissioners, supra*, 18 Wall. at 65, that California was vested with the "absolute property in * * * all soils under the tide waters within her limits."

In *Louisiana* v. *Mississippi*, 202 U. S. 1, 52 (1906), this Court stated:

> "The maritime belt, that part of the sea which, in contradistinction to the open sea, is under the sway of the riparian States."

"Sway" is defined in Webster's New International Dictionary (1938 ed.) as meaning "sovereign power; dominion. * * *" This Court considered the gulfward boundary of Louisiana as having been fixed at a distance of three leagues from the coast upon her admission to the Union by the Acts of Congress providing therefor.

In *Port of Seattle* v. *Oregon and Washington Railroad Company*, 255 U. S. 56 (1921), this Court in an opinion by Mr. Justice Brandeis, stated (p. 63):

> "The right of the United States in the navigable waters within the several States is limited to the control thereof for purposes of navigation. Subject to that right Washington became, upon its organization as a State, the owner of the navigable waters within its boundaries and of the land under the same."[37]

In *Massachusetts* v. *New York*, 271 U. S. 65 (1926), in dealing with a strip of land formerly submerged in Lake Ontario, this Court stated (p. 89):

> "It is a principle derived from the English common law and firmly established in this country that the

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[37] See pp. 48-49, *infra*, for the Pacific boundary of the State of Washington.

title to the soil under *navigable waters* is in the sovereign, except so far as private rights in it have been acquired by express grant or prescription. *Shively* v. *Bowlby*, 152 U. S. 1. The rule is applied both to the territory of the United States (*Shively* v. *Bowlby, supra*) and to land within the confines of the States whether they are original States (*Johnson* v. *McIntosh, supra; Martin* v. *Waddell, supra*) or States admitted into the Union since the adoption of the Constitution. *United States* v. *Holt State Bank*, 270 U. S. 49."

A recent and decisive application of the doctrine was in *Borax Consolidated, Ltd.* v. *Los Angeles*, 296 U. S. 10 (1935), where the Court held that a patent from the Federal Government of an island in Los Angeles Harbor did not give title below high-water mark. The City of Los Angeles claimed under a later grant from the California Legislature covering "tide lands and submerged lands." (p. 12). In an opinion by Chief Justice Hughes, the Court said (p. 15):

> "The controversy is limited by settled principles governing the title to tide lands. The soils under tide-waters within the original States were reserved to them respectively, and the States since admitted to the Union have the same sovereignty and jurisdiction in relation to such lands within their borders as the original States possessed."

In *Skiriotes* v. *Florida*, 313 U. S. 69 (1941), this Court affirmed a conviction for violation of a Florida statute prohibiting the use of certain fishing apparatus "at a point approximately two marine leagues from mean low tide on the West shore line of the State of Florida and within the territorial limits of the County of Pinellas." The Florida Court had held that the marine boundary of

a state might be fixed at a distance farther than one marine league from the shore. This Court stated:

> "It is also clear that Florida has an interest in the proper maintenance of the sponge fishery and that the statute so far as applied to conduct within the *territorial waters of Florida,* in the absence of conflicting federal legislation, is within the police power of the State."

As we have already pointed out, this Court earlier had upheld the regulation by States of oyster culture (*McCready* v. *Virginia,* 94 U. S. 391), fishing (*Manchester* v. *Massachusetts,* 139 U. S. 240), and sponge fishing (*The Abby Dodge,* 223 U. S. 166), over the adjoining coastal waters. The States have this right to regulate fishing because they hold the propriety of the soil (*Smith* v. *Maryland,* 18 How. (59 U. S.) 71).

These decisions affirm the States' ownership of submerged lands underlying coastal waters, for "the jurisdiction of a State is coextensive with its territory; coextensive with its legislative power" (*United States* v. *Bevans,* 3 Wheat. (16 U. S.) 336, 386-87, *supra,* p. 7).

Thus we find that the Supreme Court in at least fifteen decisions from *Martin* v. *Waddell* to *Skiriotes* v. *Florida,* has repeated the rule of State ownership of the bed of navigable waters within State boundaries as above defined. Plaintiff would now have us believe that all these statements are only *dicta,* and erroneous *dicta,* which this Court should repudiate under the guise of a distinction between coastal waters and other navigable waters.

There is no valid distinction of the foregoing cases, and we have seen that many of them are square holdings.

The suggested distinction between lands under coastal waters and lands under navigable waters has no basis in

law. We have seen above (11 A) that the common law recognized the King's ownership in coastal waters on the same basis as his ownership of the beds of navigable waters generally.

Angell on *Right of Property in Tide Waters, and in the Soil and Shores Thereof* (Boston, 1826), one of the first treatises on water rights published in this country, stated the rule clearly (p. xiii):

> "In the arms and inlets of the sea, and also in the sea itself, so far as the right of national dominion extends, the sovereign power not only exercises a right of jurisdiction, but also a *right of property or ownership.*" (Italics from original.)

Angell, whose work was familiar to the Supreme Court a century ago,[38] stated definitely that the King had been the proprietor of tide waters in this country (pp. 37-38), that the Atlantic colonies had the same rights therein which the King had had, and that they never relinquished this right to the Federal government (pp. 50-51).

In John Bassett Moore's Digest of International Law (House Doc. 551, 56th Congress, 2d Sess.), the author quoted (at Vol. I, p. 671) *as an authoritative statement of the law* the following portion of this Court's opinion in *Illinois Central R. Co.* v. *Illinois*, 146 U. S. 387, 437 (1892):

> "So also, by the common law, the doctrine of the dominion over and ownership by the Crown of lands within the realm under tide waters is not founded upon the existence of the tide over the lands, *but upon the fact that the waters are navigable*, tide waters and navigable waters, as already said, being used as synonymous terms in England."

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[38] See *Charles River Bridge* v. *Warren Bridge*, 11 Pet. 420, 557 (1837); *Smith* v. *Maryland*, 18 How. 71, 75 (1855).

Plaintiff's case is predicated upon the unsupported assumption that a different legal principle governs the question of title to submerged lands in coastal waters from that which admittedly determines title to lands underlying inland navigable waters. If this were true, it is inevitable that the Supreme Court, in the hundred years in which it has dealt with these problems, would have indicated some such distinction and would have placed some limitation upon the broad principle which it has so many times announced. On the contrary, the Court has been at pains to use language which states the broad rule that the States own all lands beneath their navigable waters, regardless of the location of the waters or whether they be salt or fresh. The fact that no such distinction has ever been recognized or even suggested heretofore, taken in consideration with the rationale underlying this general principle, is, we submit, conclusive of the proposition that ownership of land underlying both inland navigable waters and coastal waters is governed by the same legal principle.

For example, in *Martin* v. *Waddell,* 16 Pet. (41 U. S.) 367 (1842), the ownership of submerged lands in Raritan Bay was at issue, but the court made specific reference to "all navigable waters and the soil under them * * *" in upholding state ownership. (See pp. 24-25, *supra.*)

In the leading case of *Pollard* v. *Hagan,* 3 How. (44 U. S.) 212 (1845), lands under all navigable waters were emphasized in the decision, although the title to lands under water at the mouth of the Mobile River was specifically in contest.

The Court stated (p. 230):

> "The *shores of navigable waters,* and the *soils under them,* were not granted by the Constitution to the United States, but were reserved to the States respectively."

It is obvious from this language that the Court is deliberately laying down an all-inclusive rule which applies (1) to the shores of navigable waters and (2) to the soils under navigable waters. This phraseology necessarily includes all navigable waters within a state's territorial boundaries and shows all lands beneath such waters to be governed by the same rule. Careful analysis of the language used in the many other cases shows the same application of the basic principle to all navigable waters within the state's jurisdiction.

The rationale is clear. If the lands underlie navigable waters and are situated within the boundaries of a State, title to such lands is vested in the State. It was not fortuitous that the language used in the last mentioned cases, and many others, was broad. It was necessarily broad, because the principle applied was broad. The principle was never divided, for it was the one governing rule supporting State ownership and was vastly more important than title issues over divers segments of submerged lands. To state the rule was to adjudicate ownership in all cases.

The same principle which applies to submerged lands under coastal waters controls the ownership of lands beneath the Great Lakes (See *Illinois Central R. Co.* v. *Illinois*, 146 U. S. 387 (1892), p. 32, *supra*; *Massachusetts* v. *New York*, 271 U. S. 65 (1926), p. 33, *supra*).

The same principle is uniformly applied to lands under other navigable lakes,[39] and to the beds of navigable rivers.[40]

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[39] *United States* v. *Holt State Bank*, 270 U. S. 49 (1926); *State ex rel. Com'rs* v. *Capdeville*, 146 La. 94, 83 So. 421 (1919), cert. den. 252 U. S. 581 (1920); See also *United States* v. *Oregon*, 295 U. S. 1, 14 (1935); *Hardin* v. *Jordan*, 140 U. S. 371, 381-82 (1891).

[40] *County of St. Clair* v. *Lovingston*, 23 Wall. 46 (1874); *Barney* v. *Keokuk*, 94 U. S. 324 (1876); *Scott* v. *Lattig*, 227 U. S. 229, 243 (1913); *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53, 60 (1913); *United States* v. *Utah*, 283 U. S. 64 (1931).

The statements that we have quoted from Supreme Court cases affirming State ownership of submerged lands were not made without careful consideration or without reason. One poignant basis for the doctrine was set forth in *Pollard* v. *Hagan*, 3 How. (44 U. S.) 212, 230 (1845), as follows:

> "To give to the United States the right to transfer to a citizen the title to the shores and the soils under the navigable waters, would be placing in their hands a weapon which might be wielded greatly to the injury of State sovereignty, and deprive the States of the power to exercise a numerous and important class of police powers."

This reasoning is applicable to the beds of all "navigable waters," both inland and coastal.

To bolster its argument that the uniform and repeated pronouncements of this Court concerning State ownership of coastal waters are unsound, the Government cites (Br. pp. 47-48) *The Queen* v. *Keyn* [1876], L. R. 2 Exch. Div. 63, a case of extremely doubtful authority. It is strange that the government, which accuses this Court of dictum on the subject, should rely on dicta so patently unnecessary as those of Cockburn, C. J., in that case, where the only issue was the jurisdiction of admiralty court to try an offense committed by a foreign vessel exercising the privilege of navigation in British coastal waters. The decision was reached by a vote of seven to six, with such distinguished judges as Coleridge, C. J., and Lindley, J., declaring the three-mile belt to be part of English territory. The decision—as to admiralty jurisdiction—was promptly corrected by statute (41 & 42 Vict., c. 73). The dicta concerning ownership were inconsistent with earlier cases, such as *Benest* v. *Pipon*, 1 Knapp 60, 67, 12 Eng. Repr. 243 (1829), where the Privy Council had held that

the sea and the land beneath it are the property of the King.[41] In the later case of *Secretary of State for India* v. *Chelikani Rama Rao*, L. R. 43 Ind. App. 192, 199, 32 T. L. R. 652 (P. C. 1916), where the emergence of an island near Ceylon raised squarely the question of ownership of the ocean floor, the dicta in the *Keyn* case were criticized as contrary to the common law rule of Crown ownership, and the *Keyn* dicta were not followed.

Even if all the statements we have quoted from this Court's decisions were *dicta* (as the government would like to assume) they would still be controlling evidence of the American law, for

> "Reannouncement" of a "doctrine repeatedly over a period of more than 100 years serves to establish it, not only as the consistent view of the court, but also as a rule of property upon which practical transactions have been, and are being, based."
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> *United States* v. *Guaranty Trust Co.*, 33 F. (2d) 533, 537 (1929), aff'd, 280 U. S. 478 (1930).

In the face of the repeated and uniform recognition by this Court of State title to submerged lands underlying coastal waters, there is no justification for claiming that any different rule or rationale should be applied in the present action.

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[41] The Government is forced to confess (Br. p. 50) that the large majority of English cases have always favored the rule of the King's ownership of land under coastal waters. Even if this rule had been abandoned in the nineteenth century (which was not the case), it would not be material, for the common law as accepted in this country is the common law as it existed in England at the time of our separation from the mother country with only such modifications as have been made by our courts or legislatures. See *Shively* v. *Bowlby*, 152 U. S. 1, 14 (Govt. Br. p. 115); *Cathcart* v. *Robinson*, 5 Pet. 264, 280 (1831).

D. California and other States subsequently admitted entered the Union on an equality with the original States.

No distinction has been or can be drawn between the original thirteen States and those later admitted, with respect to the ownership of submerged lands.

Upon acquisition of the territory ceded by Mexico in 1848, the United States acquired title to lands underlying navigable waters, including tide lands,[42] but these submerged lands were held in trust for future States to be created out of such territory. Title to these lands passed to California at the time of her admission into the Union in 1850.[43]

California, like other States, entered the Union "upon equal footing with the original States, in all respects whatever,"[44] particularly with absolute property in and dominion over the beds underlying her navigable waters, *including those lands under coastal waters.* This Court has stated the reason for recognizing State ownership of such submerged lands (see p. 39, *supra*). No one can suppose that it was the thought of Congress to change the whole policy of the government and reserve to the nation the title and control of the soil beneath the navigable and

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[42] *Knight* v. *United States Land Association*, 142 U. S. 161, 183 (1891), citing cases.

The principles applicable to tide lands are applicable to lands underlying all navigable waters. *Shively* v. *Bowlby*, 152 U. S. 1 (1894). To California then belong her navigable waters and the soils under them. See *Pollard* v. *Hagan*, 3 How. (44 U. S.) 212, 229 (1845).

[43] *Borax Consolidated, Ltd.* v. *Los Angeles*, 296 U. S. 10, 16 (1935); *Mumford* v. *Wardwell*, 6 Wall. 423 (1867).

[44] *Weber* v. *Board of State Harbor Commrs.*, 18 Wall. 57 (1873); *Pollard* v. *Hagan*, 3 How. 212 (1845); *Brewer Oil Co.* v. *United States*, 260 U. S. 77 (1922); *Scott* v. *Lattig*, 227 U. S. 229, 242 (1913).

tide waters,[45] including submerged lands underlying coastal waters.

This Court has stated that the sovereignty of California and the rights and powers dependent upon it are as complete as those of the original States (*United States* v. *Mission Rock Co.*, 189 U. S. 391, 404 (1903). Entering the Union "upon equal footing with the original States," California was entitled to define her boundaries in the sea, and did so with Congressional sanction.

By her Constitution, adopted in 1849, California defined her boundaries as running "to the Pacific Ocean and extending therein three English miles; thence, running in a northwesterly direction and following the direction of the Pacific coast."[46] This Constitution was approved and ratified by the President and reported by him to the Congress, which referred to it in the Act of Admission adopted on September 9, 1850.[47]

The other States admitted after the original thirteen each had the same rights as California. From the earliest times, when the Congress began to create States out of the Northwest Territory given to the United States by certain of the original States, it provided that each one should be admitted "on equal footing with the original States,"[48] in all respects whatever.

In decisions relating to the submerged lands of other States, this Court as well as State Courts have frequently

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[45] Compare this Court's statement in *Mann* v. *Tacoma Land Co.*, 153 U. S. 273, 284 (1894), in referring to the Act admitting the State of Washington.

[46] Article XII, Sec. 1, quoted in Apdx. to Answ., Part I, page 22.

[47] 9 Stat. 452; See Apdx. to Answ., pages 16-24.

[48] See Northwest Territory Ordinance, adopted by the Continental Congress on July 13, 1787, quoted in Apdx. to Answ., pp. 63-64.

referred to them as having been admitted "on an equal footing" with the original States.[49]

Were it not for the vigor with which the argument is pressed by the Government, it would seem idle to take any space to defend a doctrine which has been so frequently and so recently reiterated as the ownership of land beneath navigable waters under the "equal footing" rule. This doctrine was announced over a century ago in *Pollard* v. *Hagan*, 3 How. 212, 228-29 (1845), holding that Alabama must have the same right of ownership in the soils under navigable waters as the original thirteen States. Any rule which impaired the equality or uniformity of such ownership as among States would be unjustified and confusing. Chief Justice Stone again expressed the doctrine forcefully in 1935 in a case of original jurisdiction, *United States* v. *Oregon*, 295 U. S. 1, 14 (1935):

> "the title of the United States to lands underlying navigable waters within the State passes to it, as incident to the transfer to the State of local sovereignty".

To overcome such definite pronouncements, the Government again relies on fanciful distinctions, and asserts that navigable coastal waters are to be differentiated from navigable bays, harbors and inland waters and attributed to Federal rather than State sovereignty. We deny this assertion, which has no support in any decided case. State economy is just as much concerned with the regulation and development of the soils which underlie the adjoining coastal waters, whether for fishing, oyster culture or mineral development, as with the soils under other navigable waters.

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[49] See *Shively* v. *Bowlby*, 152 U. S. 1, 26 (1894); *Scott* v. *Lattig*, 227 U. S. 229, 242-43 (1913); *Oklahoma* v. *Texas*, 258 U. S. 574, 583 (1922); *United States* v. *Utah*, 283 U. S. 64, 75 (1931); *Borax Consolidated, Ltd.* v. *Los Angeles*, 296 U. S. 10, 15 (1935); *Wilton* v. *Van Hessen*, 249 Ill. 182, 94 N. E. 134 (1911).

In reality, the Government's theory is extracted from a distortion of Mr. Justice Sutherland's reasoning on an entirely different point in *United States* v. *Curtiss-Wright Export Corp.*, 299 U. S. 304 (1936), cited at pages 76-78 of the Government brief. The case had nothing whatever to do with the title to land or with any navigable waters. It involved the validity of a joint resolution of Congress which authorized the President to prohibit the sale of arms and munitions of war to the countries engaged in fighting in the Chaco, and punished violation as a crime. The resolution was attacked as constituting an illegal delegation of powers. The complete absence of any real support for the Federal Government's position in the present case is shown by their having to rely, on the question of title, on a case which has not the remotest connection with title questions.

We have already disposed of the argument that rights in coastal waters are different from other rights because they are vindicated by the national government (pp. 5-6, *supra*).

Nor is there any force in the argument that rights in coastal waters are the "creatures" of international law. It is significant that the first official pronouncements of this Government upon the rights in coastal waters, the 1793 opinions referred to in the Government Brief (pp. 128-132), were made with respect to an incident occurring in Chesapeake Bay. The Government concedes that this "historic bay" is to be treated as inland waters (Br., p. 18), and that it does not seek to overthrow State ownership of lands under inland waters (Br., p. 143), but the rule which recognizes title to bays is just as much (and just as little) a matter of international law as the rule of ownership in coastal waters. Again it is a rule of international law, that of the thalweg, which was the basis of decision in *Louisiana* v. *Mississippi*, 202 U. S. 1, 49 (1906); yet the Government seeks to distinguish that case as one involving inland waters (Br.,

p. 158). That same rule of international law fixes the boundary between New York and Ontario in the middle of the channel of the Niagara River; yet it is clear that the State of New York owns the bed of the river out to the international boundary (*International Paper Co.* v. *United States*, 282 U. S. 399, 404 (1931); *Matter of Niagara Falls Power Co.* v. *Water Power & Control Commission*, 267 N. Y. 265, 270, 196 N. E. 51 (1935), cert. den. 296 U. S. 609 (1935)).

None of the arguments advanced by the United States, therefore, constitutes any convincing reason for denying to any State any of the rights which the Original Thirteen States had in their coastal waters.

One right of the States was to fix their boundaries in the sea:

> "Within what are generally recognized as the territorial limits of States by the law of nations, a State can define its boundaries on the sea".
>
> *Manchester* v. *Massachusetts*, 139 U. S. 240, 264 (1891).

Therefore each State which was admitted "on an equal footing" with the original thirteen acquired, first, the same ownership of submerged lands under its coastal waters as the original thirteen, and, second, the same right as the original thirteen States to define its boundaries on the sea within the limits fixed by the law of nations.

POINT III

The States' ownership of the bed of the sea out to the limit of their jurisdiction has been asserted, and acquiesced in by the Federal Government, for over 150 years, and is binding on the Federal Government.

A. State constitutions, statutes and decisions.

The answer originally filed by the State of California recites numerous examples of assertion by the States of

title to lands under navigable waters, including areas within the coastal waters. The list is necessarily incomplete, but it nevertheless constitutes an impressive record of statutes, decisions and grants, showing continued exercise of the same proprietary rights in coastal waters which the colonies had asserted before the Revolution. Plaintiff would now have this Court not only repudiate (under the guise of distinguishing) its previous decisions concerning the title of the States, but also brand the State decisions of the past century as incorrect and search for some non-proprietary theory to support the State statutes, despite the fact that both were in harmony with all the statements of this Court during the intervening years concerning State title to lands under coastal waters.

Exercise of ownership has taken many forms, and it is entirely fallacious for the Government to assert (Br., pp. 72, 77) that some of the original thirteen States never have claimed the marginal sea as being within their boundaries. On the contrary, all have claimed it, and no responsible person ever imagined that the Federal Government had any adverse claim thereto until shortly prior to the filing of the present suit.

A first category of State acts asserting title to lands under coastal waters is found in the provisions of statutes and constitutions fixing State boundaries so as to include islands or waters within a given distance from the coast.

Georgia, by Act of February, 1783, claimed all islands within twenty leagues of the coast (Georgia Dig. of Laws to 1800, pp. 258, 264; *id.*, p. 35, 1798 Const. Art. I § 23), and New Hampshire, in fixing its boundary "by the Sea", specifically included the Isle of Shoals (V. N. H. Laws (1784-92) 766, Act of June 16, 1791; Appdx. to Answ., p. 716).

Congress early recognized that coastal seas are parts of the States. In the Ohio Enabling Act of April 30, 1802 (2 Stat. 173), it declared that the northern boundary

of Ohio was in the water of Lakes Michigan and Erie (Apdx. to Answ., p. 724). The Louisiana Enabling Act passed by Congress in 1811 (2 Stat. 641), as well as the Louisiana Constitution of 1812 (Apdx. to Answ., p. 604), both include all islands within three leagues of the coast, while the similar Mississippi Enabling Act (3 Stat. 348) and Constitution of 1817 mention six leagues from shore (Apdx. to Answ., p. 611).[50] The Illinois Enabling Act of 1818 (3 Stat. 428) fixed the boundary of that new state as "the middle of Lake Michigan."[51]

Texas, when it became independent in 1836, nearly a decade before its annexation, established its boundary at three leagues from land (Apdx. to Answ., p. 58).

Further Federal approval of boundaries embracing coastal waters in the open sea is found in the case of California and Oregon, as well as some of the States admitted later.

The California Constitution of 1849 has already been mentioned (*supra*, p. 42), while Congress itself in the Act admitting Oregon (February 14, 1859), fixed the boundary as "Beginning one marine league at sea due west * * * from the line of the coast" (11 Stat. 383; Apdx. to Answ., p. 578).

Massachusetts later in that same year fixed its territorial limits as "one marine league from its seashore at extreme low-water mark" (Mass. Acts 1859, c. 289; Apdx. to Answ., p. 708). This Act merely confirmed an

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[50] See also Alabama Enabling Act (3 Stat. 489) and Constitution of 1819 (Apdx. to Answ., p. 616).

[51] See also Act providing for admission of Michigan, June 15, 1836 (5 Stat. 49; Apdx. to Answ., p. 733) and Wisconsin Enabling Act of Aug. 6, 1846 (9 Stat. 56; Apdx. to Answ., p. 736); Pennsylvania's northern boundary extends into Lake Erie (5 Stat. 49, Act of June 15, 1836; Apdx. to Answ., p. 686).

ownership which had been asserted in various ways previously. Chief Justice Shaw had said, for instance, concerning the Massachusetts Charters from Charles I and James I that:

> "all the right, both to the soil under the sea, as far as by the law of nations one government is conceded to hold an exclusive right to the sea-coasts, and to the shores and arms of the sea, where the tide ebbs and flows, did vest in the grantees under those charters * * *."
>
> *Weston* v. *Sampson,* 8 Cush. 347, 353 (Mass. 1851).

The eastern boundary of Florida was described in the State Constitution of 1868 (Art. I) as "along the edge of the Gulf Stream" and its gulf boundary as three marine leagues (nine nautical miles) from the shore (Apdx. to Answ., pp. 627-28). This was the Constitution to which the Act of Congress had referred in readmitting the State of Florida to representation in Congress. Act of June 25, 1868, 15 Stat. 73. (See *Skiriotes* v. *Florida,* 313 U. S. 69, 70 [1941]; *Pope* v. *Blanton,* 10 F. Supp. 15 [N. D. Fla. 1934].)

Rhode Island described its boundary as "one marine league from its sea-shore, at high water mark" (R. I. Gen. Stats. 1872, c. I. § 1). Similar statutes, using boundaries at three miles or more from shore, but generally measured from low-water mark, have been passed by other States.[52]

The President, under the Washington Enabling Act of 1889 (25 Stat. 676, 697), proclaimed the Constitution of

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[52] Ga. Act 410 of 1916, Apdx. to Answ., p. 647; Maine Acts 1915, c. 330 ("to the extreme limit of the waters under the jurisdiction of this State"), Rev. Stat. 1930, c. 143, § 3, p. 1640; N. J. Act of May 17, 1906 (P. L., p. 542).

Washington (26 Stat. 1552), which described its boundary as in the Pacific Ocean "one marine league offshore" (Art. XXIV, § 1; Apdx. to Answ., pp. 541-42).[53]

Washington by her constitution (Art. XVII, § 1; Apdx. to Answ., p. 542), Florida by statute in 1913 (1913 Laws, C. 65, 32, §1; Apdx. to Answ., p. 628), and Texas by statute in 1925 (1936 Rev. Civ. Stats., Art 4026, Acts 1925, p. 438) expressly declared their ownership of all submerged lands within their jurisdictions. (See also Va. Code [1887] §§ 1338, 1339).

A State's ownership of the bed of its coastal waters does not depend, however, upon express marking of a boundary by statute or otherwise. Its assertion by statute is merely the assertion of a pre-existing title, rather than being itself the source of title. This is illustrated by the fact that State jurisdiction had been exercised in many cases before the precise boundaries in the ocean had been expressly described.

A second category of State acts based on ownership of submerged lands under coastal waters is found in the statutes relating to the regulation or leasing of fisheries, oyster beds and other marine life or resources. Thus New Jersey early forbade non-residents to take clams or oysters in any of the rivers, bays or waters of the State (Act of December 10, 1825—Comp. Laws (1833) 124), and Rhode Island had a similar regulation against taking shellfish within the waters or on the shores of this State (Dig. 1844, p. 533, § 6; see *State* v. *Medbury*, 3 R. I. 138—1855).

It has been impossible to assemble all the fishing laws of the States, but it is clear that control of fisheries in the open sea continued to be a matter of concern to the States. Mississippi granted to the upland owners the exclusive right to plant oysters in the waters of the Gulf of

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[53] *Cf. Lubetich* v. *Pollock*, 6 F. (2d) 237 (W. D. Wash. 1925) (holding no Federal question presented by State prosecution of fishing within three-mile belt).

Mexico in front of their lands (1886 Miss. Laws, p. 180; Apdx. to Answ., p. 614); Louisiana by a series of acts beginning in 1886[54] declared its title to all oyster beds underlying the navigable waters of the Gulf of Mexico within its territorial limits, and provided for leases thereof to individuals upon the payment of specified rentals to the State; Virginia claimed ownership of oyster-beds "whether the said bed * * * shall ebb bare or not" (Va. Code 1887, § 1338); Georgia gave to upland owners the exclusive rights to oysters and clams in the tide waters of the State, which were defined to include waters below low tide (1902 Ga. Laws, p. 108; Apdx. to Answ., pp. 648-49), but forbade the use of dredges within 1000 feet of ordinary mean tide (1905 Laws 73; Apdx. to Answ., p. 650); Rhode Island authorized State leases for oyster culture of land "covered by four feet of tidewater at mean low tide" (General Laws 1909, c. 203; Apdx. to Answ., p. 706); the New York Conservation Law fixed the marine district as including "all tidal waters within three nautical miles of the State coast" (L. 1912, c. 318); Oregon has authorized the State Land Board to lease land between low tide and three miles seaward therefrom for the harvesting of kelp and other seaweed (1917 Laws of Ore., c. 276, p. 516; Apdx. to Answ., p. 586); Texas has asserted its ownership of the bed of the Gulf of Mexico within its jurisdiction and vested the Game, Fish and Oyster Commission with control of fishing therein (Acts 1925, p. 438; Rev. Civ. Stat. [1936] Art. 4026); New Jersey has exercised jurisdiction over fishing in its Atlantic Waters (23 N. J. S. A. §§5-241, 5-24.2(e), 3-43); and Washington provided for leases of oyster beds lying below extreme low tide under navigable waters (Act 255 of 1927, Sec. 142, Apdx. to Answ., p. 557).

The long continuous nature of this jurisdiction is illustrated by New Jersey's current Shellfish Law, and espe-

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[54] Acts 106 of 1886, 121 of 1896 and 159 of 1900 (Apdx. to Answ., p. 604).

cially Chapter 4, "Regulations applicable to Atlantic Coast." The imposition of a seasonal restriction on oyster gathering (N. J. S. A. § 50:4-1) and the exclusion of non-residents (§ 50:4-2 and §§ 50:2-1, 50:2-2) go back to the colonial regulations of 1718 (I Nevill 86, *supra*, p. 18), while the restriction on the use of dredges, etc. (§ 50:4-2) goes back at least to the prohibition in the New Jersey Act of June 9, 1820, § II (1838 Digest N. J. Laws, p. 372).

In addition to the statutes cited above, there are numerous State decisions upholding State regulation of fisheries in the coastal waters. For instance, in *Bosarge* v. *State*, 23 Ala. App. 18, 121 So. 427 (1928), cert. den., 219 Ala. 154, 121 So. 428 (1929), cert. den., 280 U. S. 568, (1929), the Alabama Court, in reliance on this Court's holding in *Manchester* v. *Massachusetts* (139 U. S. 240, previously referred to at pp. 18, 28-29, 45, *supra*), held that an Alabama statute regulating the trolling for shrimp could be applied at a point within the Gulf of Mexico three-fourths of a mile beyond the beach of one of the outermost islands and that such point was within the "territorial jurisdiction" of the State of Alabama.

In the early case of *Dunham* v. *Lamphere*, 3 Gray 268 (Mass. 1855), Chief Justice Shaw sustained a Massachusetts statute forbidding the use of seines within one mile of the shores of Nantucket Island and Gravel Island.

In *Lipscomb* v. *Gialourakis*, 101 Fla. 1130, 133 So. 104 (1931), the Florida Court upheld a conviction for using diving apparatus to take commercial sponges from the Gulf of Mexico within the territorial limits of Florida.

Other State cases dealing with fishing regulations and other questions of ownership of submerged coastal lands are listed in the footnote.[55]

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[55] *Ocean Industries, Inc.* v. *Superior Court*, 200 Cal. 235, 252 Pac. 722 (1927) (enforcing regulation against sardine reduction plant on ship anchored off shore); *State* v. *Ruvido*, 137 Me. 102 (1940)

(*Continued on following page*)

A third category of State acts in the coastal sea relates to express grants of land under water or rights to extract products therefrom. An example of the exercise of such jurisdiction in coastal waters is a New Jersey statute entitled: "An act to authorize the owners of land upon tidewaters to build wharves in front of the same", which authorized "the owners of lands situated along and upon tidewaters to build docks or wharf on the shore in front of his lands beyond the limits of ordinary low water * * *" subject to license and to the preservation of public navigation (N. J. Laws 1851, p. 335).[56]

The right-of-way of the Florida East Coast Railway was largely on submerged lands granted by the State of Florida (Apdx. to Answ., pp. 641-45).

The New York Land Office, acting under long-standing statutory authority, gave a grant of land under water in 1897 extending 1500 feet from mean high water line into the Atlantic Ocean (see *People* v. *Steeplechase Park Co.*, 218 N. Y. 459, 113 N. E. 521—1916). The right to make

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(*Continued from preceding page*)

(fishing regulation within three-mile limit); *Burnham* v. *Webster*, 5 Mass. 266 (1809) (penalty for taking bass in the sea near mouth of river); *Dill* v. *Inhabitants of Wareham*, 7 Metc. (48 Mass.) 438 (1844) (King's ownership of fisheries passed to colonies); *Commonwealth* v. *Boston Terminal* Co., 185 Mass. 281, 282 (1904) (State has title to land within one league of shore); *State* v. *Stewart*, 184 Miss. 202, 184 So. 44 (1938) (removal of sand from bed of a tidal inlet); *Simpson* v. *Moorhead*, 65 N. J. Eq. 623 (1904) (holding that State owns tidal meadows below high water mark); *State* v. *Brown*, 3 Dutcher (27 N. J. L.) 13 (1858) (right to build wharf beyond low water mark); *State* v. *Kofines*, 33 R. I. 211 (1911) (license for lobster fishing); *Narragansett Real Estate Co.* v. *Mackenzie*, 34 R. I. 103 (1912) (holding that State has title to the bed of the Ocean); *State ex rel. Luketa* v. *Pollock*, 136 Wash. 25, 239 Pac. 8 (1925) (permitting enforcement of State fishing regulations within three-mile limit).

[56] *Cf. Freed* v. *Miami Beach Pier Corp.*, 93 Fla. 888, 112 So. 841 (1927) (right of littoral owner to build wharf on soil of marine belt, owned by State).

similar grants is one of the basic assumptions in New York's recent anti-erosion statute, permitting grants to municipalities of State owned land under water along the Atlantic Ocean, for the construction of jetties and other works to arrest erosion (N. Y. Laws 1945, c. 535).

Among other examples, Pennsylvania has authorized the Water and Power Resources Board to permit the dredging of sand and gravel from the bed of Lake Erie (Act of June 25, 1913; Apdx. to Answ., p. 687), and Ohio has authorized municipalities to lease land under water in Lake Erie for docks and wharves (Apdx. to Answ., p. 725).

Texas, beginning as early as 1913, authorized the Commissioners of the General Land Office to lease that portion of the Gulf of Mexico within its jurisdiction, for the production of oil and gas (1913 Texas Laws, p. 409; Apdx. to Answ., pp. 595-96). Act 30, Extra Session of the Legislature of Louisiana of 1915, and subsequent acts, authorized the execution of oil, gas and mineral leases covering State-owned lands, including submerged lands. (See also Apdx. to Answ., pp. 608-10.)

Grants of submerged lands in bays and harbors by the various States are too numerous to recite, but the States' ownership of such lands is based on the same principle as their ownership of lands under coastal waters. The Government recognizes the unity of the principle, and also that reliance on ownership of so-called inland waters has been of too great proportion to permit any suggestion of change (Br., p. 143).

Reference should also be made to the State cases dealing generally with the territorial limits of the States. A typical example is *Commonwealth* v. *Manchester*, 152 Mass. 230 (1890), wherein the Court upheld the statutory definition of the territorial limits of Massachusetts as extending "one marine league from its seashore at low-water mark." (Aff'd, 139 U. S. 240, *supra*, p. 28.)

In speaking for the Massachusetts Court, Field, *C. J.*, made the terse statement of the principle of law (p. 241):

> "There is no belt of land under the sea adjacent to the coast which is the property of the United States and not the property of the States."

In all of the above cases the Courts based the powers of the States to regulate on the *ownership* by the States of the soils beneath their territorial waters.

These many State acts and decisions recognizing State title to submerged lands furnish strong additional reason for adhering to the rule, even apart from the decisions of this Court mentioned in Point II. As this Court said in *Best* v. *Polk,* 18 Wall. 112, 117 (1873), with respect to claims of title based on United States treaty with Indians:

> "'* * * These decisions, furnishing a rule of property on this subject in Mississippi, were not brought to this court for review, as they could have been, but have been acquiesced in for a quarter of a century. To disturb them now would unsettle titles *bonâ fide* acquired."

B. Federal acceptance of grants from the States.

The repeated rulings and declarations of this Court sustaining and emphasizing the States' ownership of all lands under tidal waters within their boundaries have always been accepted and acted upon by the other branches of the Federal Government. The rule has thus been treated as a settled one. Whenever the Federal Government has required sites under coastal waters for defense or navigation, it has obtained them from the States by cession, by purchase, or by condemnation proceedings.

For instance, when the Federal Government built jetties in the Ocean, it has frequently obtained grants from the

States covering the land on which the jetties were built. Such grants were obtained in 1899 from South Carolina, covering a jetty extending 500 feet into the Atlantic Ocean (Apdx. to Answ., p. 653); from Florida in 1938, for a jetty at the mouth of the St. Johns River extending 2 miles into the Atlantic Ocean (Apdx. to Answ., p. 1931); and from Texas in 1912, for a strip extending 2 miles into the Gulf of Mexico from the City of Galveston (Apdx. to Answ., p. 592).[57]

Other grants of land under water, below low-water mark, are set forth in the Appendix to California's Answer. See, for instance, the Acts of Mississippi in 1858 (Apdx. to Answ., p. 612); Delaware in 1871, 1873 and 1899 (Apdx. to Answ., pp. 681-84); South Carolina in 1896 and 1900 (pp. 654 to 656); Washington in 1909 (pp. 543-44); Virginia in 1922 (p. 667); and Florida in 1939 (Apdx. to Answ., p. 639). The foregoing list does not include the more numerous grants in bays and harbors, such as Alabama's 1919 grant of 12 acres of submerged land in Mobile Bay (Apdx. to Answ., pp. 618-19), although we have seen that the same rule sustains State title to submerged lands in bays as applies in coastal waters.

Special mention should be made of lighthouse sites, for the Federal Government has always recognized that these must be obtained from the States. The Federal statute provides (33 U. S. C. A., § 727):

> "No lighthouse, beacon, public piers, or landmark, shall be built or erected on any site until cession of jurisdiction over the same has been made to the United States."

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[57] In the absence of such a grant, the jetty remains within State jurisdiction. *Winston Bros. Co.* v. *Galloway*, 168 Ore. 109, 121 P. (2d) 457 (1940) (sustaining State tax on profits from work done on jetty beyond low-water mark).

The States and the United States have acted on the principle set forth in this statute, that deeds from a State are necessary for lighthouse sites, whether they be above or below low-water mark. The Legislature of Maine in 1887 made a grant of lands under water in Quoddy Roads (Apdx. to Answ., p. 719); New York in 1874 ceded jurisdiction over a number of sites in New York Harbor and Long Island Sound (Apdx. to Answ., pp. 692-96); and general statutes have been enacted by Alabama in 1875 (Apdx. to Answ., pp. 617-18), Maryland in 1874 (Apdx. to Answ., pp. 671-72), Massachusetts in 1880 (Apdx. to Answ., pp. 709-10), Michigan in 1874 (Apdx. to Answ., p. 734), Ohio in 1875 (Apdx. to Answ., p. 726), South Carolina in 1874 (Apdx. to Answ., p. 658), and Virginia in 1874 and later (Apdx. to Answ., pp. 664-65).

Similarly, grants have been obtained covering lands under water required by the Federal Government for forts.[55]

The Government attempts to belittle these grants by eliminating all those in harbors or bays, eliminating the Great Lakes as inland waters and then finding some excuse for each of those which it admits covered coastal waters. We have shown earlier in this brief (Point II C, *supra*) that bays and the Great Lakes are all subject to the same rules as coastal waters. Even apart from that, the fact remains that the United States has repeatedly accepted State deeds, made upon the assumption that the State held title to land under coastal waters, and that the Government has been unable to point to a single claim of Federal ownership prior to Mr. Ickes' reversal of his own earlier position in 1937.

The Federal Government, through its various agencies, has recognized the State ownership of these submerged

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[55] South Carolina Act of 1896 (Apdx. to Answ., pp. 654-55); California statutes of 1897 and later (Apdx. to Answ., pp. 91 to 116).

lands, not simply by requesting and accepting deeds from the States, but by other affirmative rulings.

The Attorney General has been required to pass on the validity of the title of the State in each instance where a deed was received (R. S. § 355; 40 U. S. C. A. § 255). An illustration is the opinion of the Attorney General of the United States affirming Washington's title to tide-lands and waters in the Pacific Ocean, surrounding the Fort Canby Military Reservation, rendered March 20, 1925 (34 Op. A. G. 428; Apdx. to Answ., pp. 545-46).

The Commissioner of the United States General Land Office, in 1910, in rejecting an application for submerged lands east of Key West, Florida, ruled that title thereto belonged to the State by its right of sovereignty (Apdx. to Answ., p. 637). Other rulings relating to submerged lands in Washington (13 L. D. 299, Apdx. to Answ., p. 565) and Texas (Navy Dept. Report of 1917, Apdx. to Answ., pp. 596-602) and lands in Lake Ontario within the State of New York (7 Op. A. G. 314; Apdx. to Answ., p. 699) and in Lake Michigan within the State of Illinois (8 Op. A. G. 172; Apdx. to Answ., p. 728) and within the State of Wisconsin (House Doc. 804, 66th Cong., 2d Sess.; Apdx. to Answ., p. 737), likewise recognize State title thereto.[39]

C. The Federal policy not to deprive the States of their submerged lands.

The policy of Congress in administering the area acquired by the United States from which subsequent States were formed also shows undeviating acquiescence in the

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[39] A similar principle is applied in Alaska, where submerged lands in the Behring Sea were deemed reserved from grant, to be left to the disposition of the new State when organized (29 L. D. 395, Apdx. to Answ., pp. 531, 534).

principle of State ownership of the beds of all navigable waters including coastal waters. No grants of land under navigable waters were to be made that would rob the State of this feature of State sovereignty."[60]

Similarly, where the United States has reserved public lands when admitting a new State to the Union, it has uniformly been held that lands under navigable waters are not part of the public lands so reserved. As this Court stated in *Mann* v. *Tacoma Land Co.*, 153 U. S. 273, 284 (1894):

> "No one can for a moment suppose that it was the thought of Congress to change the whole policy of the government and reserve to the nation the title and control of the soil beneath the tide waters and those of navigable streams."[61]

In the present case, there is no suggestion that Congress has sanctioned any such far-reaching change as the United States Attorney General now seeks in respect to ownership of submerged lands. On the contrary, both houses of Congress have by positive action expressed their belief that the coastal waters and the lands under them rightfully belong to the States and have belonged to them since the Declaration of Independence (H. J. Res. 225, 79th Congress, 2d Session; see Senate Report No. 1260). The President's refusal to sign the bill was not based on the merits, but in recognition of the existence of this litigation.

There has therefore been no legislative revocation of the policy of continued acquiescence in the age-old State title,

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[60] *Barney* v. *Keokuk*, 94 U. S. 324, 338 (1876); *Shively* v. *Bowlby*, 152 U. S. 1, 49-50 (1894); *Donnelly* v. *United States*, 228 U. S. 243, 262 (1913); *United States* v. *Holt State Bank*, 270 U. S. 49, 55 (1926).

[61] See also, *Borax Consolidated, Ltd.* v. *Los Angeles*, 296 U. S. 10 (1935); *United States* v. *Oregon*, 295 U. S. 1, 14 (1935); *Pollard* v. *Hagan*, 3 How. (44 U. S.) 212 (1845).

as was true in instances mentioned by the Government relating to private titles (Govt. Br., pp. 212-14).

This history of recognition by the Federal Government of State title to submerged lands adds to the binding force of the rule we have set forth, for the United States, the same as a natural person, is bound by its acquiescence in territorial claims.

> *Missouri* v. *Iowa*, 7 How. 660, 670-73 (1849);
> *New Mexico* v. *Colorado*, 267 U. S. 30, 40-41 (1925);
> *Michigan* v. *Wisconsin*, 270 U. S. 295, 308 (1926).

Or to put it in another way—ever since the Constitution was adopted the legislatures and officials of the States and the United States have acted on the theory that the States, under the Constitution, own the soil of coastal waters. This uniformity in practice, continuing for 160 years, is a "construction of the most forcible nature" (*Stuart* v. *Laird*, 1 Cranch 299, 309 (1803); *Rogers* v. *Goodwin*, 2 Mass. 475, 477 (1807); *McKeen* v. *Delancy's Lessee*, 5 Cranch 22, 23-3 (1809); *United States* v. *Curtiss-Wright Export Corp.*, 299 U. S. at 322-29). A practical construction establishing a rule of property could not be successfully challenged at this late date, even if no judicial rulings on the point had ever been made.

The Government has attempted to do a lot of explaining in its brief. It explains away the admitted general assertions of ownership of lands beneath coastal waters, both in the eighteenth century and today, by assuming a gap at the time of the Revolution, during which the States did not make the claim; we have seen that this is a false assumption. It explains away twenty or more decisions of this Court. It brushes aside Vattel as reflecting only his own opinion. It explains away Jefferson's note of 1793. It explains away a dozen or more grants of land under coastal waters accepted from the States. It explains away Congress' fixing of State boundaries

three miles from shore. And it does not hesitate to call this Court unsound in long lines of decisions. One may say with the Queen in Hamlet, "The lady doth protest too much, methinks" (Act III, Sc. 2, l. 242).

The only true explanation of this litigation is that the Government, having found that portions of the coastal waters are valuable (Govt. Brief, p. 144), covets what is not its own, and seeks to repudiate a century and more of history in order to obtain that value without paying for it.

POINT IV

The doctrine of State ownership of lands under coastal waters is an established rule of property, which this Court should not disturb.

Plaintiff's demand for judgment in this action implies that the doctrine upon which the people of the United States and the several States have relied for a great number of years is incorrect and unfounded. A doctrine established as a rule of property since before the creation of the separate States, like that of State ownership of submerged lands, should not be overthrown. *The Lottawanna*, 21 Wall. (88 U. S.) 558 (1874); *Goodtitle* v. *Kibbe*, 9 How. (50 U. S.) 471 (1850). A consideration of some of the problems which would be raised by judicial repudiation of that doctrine emphasizes the wisdom of applying the rule just mentioned.

Recognition of Plaintiff's claim would not be a mere matter of upsetting one line of former jurisprudence to adopt and accept another, but this Honorable Court would be called upon to re-examine the whole range and scope of submerged land ownership, step by step and in fragmentary succession, over a long and indeterminate number of years.

Numberless miles of coastline would have to be contested separately. Any rule approaching uniformity would necessarily face numerous exceptions and qualifications which the several agreements of cession with former sovereigns, and different acts admitting the several States into the Union, would produce. Not only distinctions between States, but the need for detailed definitions of "inland waters," and questions as to the limits of State police power, would create uncertainties affecting many titles and the conduct of important industries.

A number of specific questions occur to us as we consider the status of jurisprudence, if the property rule of State ownership were to be unsettled by a decision for the plaintiff.

If the Federal Government owns part of the submerged lands within the coastal waters of a State, where do the lands start in their seaward extension? Do they begin at the present low-water mark, or where that mark was when a littoral State was admitted into the Union? Who would own natural accretions? Of equal importance, who would own the many square miles of coastal lands which have become submerged after coastal States were admitted into the Union? We must not be unmindful of the fact that one or more States have undergone substantial recessions of their coastlines since they were admitted to Statehood.

The diversity of coastlines, with respect to indentations, would also present a problem. Definitions of such water bodies as bays, harbors, sounds and straits would have to be made by the Courts in an approach to some uniformity of the title issues between the United States and the several States. The application of the headland-to-headland rule referred to in *Manchester* v. *Massachusetts*, 139 U. S. 240, 257 (1891), *supra*, p. 29, is by no means a simple problem. The Government's own brief shows some of these uncertainties. It refers with apparent approval

to proposals which would treat a bay ten miles or more in width at its entrance as inland waters (Br. p. 18n.), although this Court in the *Manchester* case gave "two marine leagues in width at the mouth" as the standard. In its analysis of the Answer it is unable to say with certainty whether Santa Monica Bay (Br., p. 231) and Massachusetts Bay (Br., p. 254) are to be treated as inland waters or open sea.

Quite evidently acceptance of the Government's thesis would require this Court to determine under the individual facts, the status of almost every wharf, roadstead, breakwater, cove, inlet, bayou or indentation on the entire coast, to ascertain whether it belonged to the State or the nation.

An additional class of problems which would arise from a holding of Federal title to submerged coastal lands relate to the commercial fishing industry. This industry, one of the earliest and still an important branch of the economy, has been built up under State regulation, sustained on the basis of State ownership of the sub-soil. Denial of that ownership would put in jeopardy the States' present power to retain for their own citizens the produce of the sea, and would cloud the basis for existing fishery regulations.

Recognition by the plaintiff that success in this suit may lead to attempts at further inroads on State ownership and control of submerged lands is found in the language of the Statement in Support of Motion, that

> "this case is sharply to be distinguished from those decisions *which are thought to hold* that the State has property interests in bays, harbors, rivers and other inland waters as well as the so-called tidelands" (p. 3).

The crowning evidence of the error in the Government's position is the fact that it is twice forced to admit

(Br., pp. 14, 144) that, if it persuades this Court to accept its views, it will then have to go to Congress to correct the inequity of the situation which will have been created. Observance of the general rule of respecting previous decisions on real property law will avoid the creation of any such inequity.

Conclusion

We respectfully urge that the assertion of title by the colonies and States, subsequent Congressional approval and long recognition of title in the littoral States by the Federal Government preclude the assertion of title by the Federal Government before this Court.

We also submit that the issue has been previously adjudicated by this Court; that this Court's long standing decisions and the uniform course of conduct by the executive and legislative departments of the Federal and State Governments have resulted in an established and long settled rule of property law—the ownership by the State of California and other States of their navigable waters, including submerged lands underlying coastal waters.

The complaint should be dismissed.

Respectfully submitted,

THE NATIONAL ASSOCIATION OF ATTORNEYS GENERAL.

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